68 FLRA No. 144

UNITED STATES
DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
(Agency)

and

NATIONAL AIR TRAFFIC
CONTROLLERS ASSOCIATION
(Union)

0-AR-5119

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DECISION

September 4, 2015

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Before the Authority: Carol Waller Pope, Chairman, and Ernest DuBester and Patrick Pizzella, Members

I. Statement of the Case

Arbitrator Douglas P. Hammond issued an award finding that the Agency had violated Articles 102 and 117 of the parties' agreement by issuing a policy to not reimburse the Department of Defense (DOD) for the prekindergarten tuition for dependents of eligible bargaining-unit employees (BUEs) in Guam and Puerto Rico (the policy).

In its exceptions, the Agency raises four substantive exceptions. First, the Agency alleges that the award is contrary to law as contrary to 49 U.S.C. §§ 106(*l*) and 40122(a) because the Agency did not negotiate for payments for prekindergarten dependents. Because the parties negotiated for such payments, we deny this exception.

Second, the Agency argues that the award is contrary to both DOD-wide and government-wide regulations. Because the Agency concedes that the agreement governs over the DOD-wide regulations in question and because the Agency does not cite to any government-wide regulation, we deny this exception.

Third, the Agency contends that the award fails to draw its essence from the parties' agreement. Because the Agency does not demonstrate that the Arbitrator's interpretation of the parties' agreement is irrational, unfounded, implausible, or in manifest disregard of the agreement, we deny this exception.

Finally, the Agency argues that the Arbitrator exceeded his authority. In issuing an award that affects non-BUEs, the Arbitrator exceeded his authority. Consequently, we modify the award to exclude from the award all relief to non-BUEs.

II. Background and Arbitrator's Award

This case involves a policy by the Agency concerning DOD schools and the attendance of dependents of BUEs at those schools. The DOD provides schools in United States territories and overseas locations for the dependents of DOD employees and other eligible federal employees. Some Agency employees working in Puerto Rico and Guam are eligible to send their dependents to attend DOD schools. At a certain point, the DOD began requiring other agencies to reimburse the DOD for tuition costs associated with their employees' dependents. The Agency then announced its policy that it would reimburse the tuition costs for the dependents of employees for kindergarten through the twelfth grade. Although the DOD schools offered prekindergarten, the Agency announced that it would not reimburse the DOD for any tuition costs associated with prekindergarten dependents.

The Union filed a grievance alleging that, by not reimbursing the cost of prekindergarten, the Agency violated Articles 102 and 117 of the parties' agreement. In pertinent part, Article 102 states that "[t]he Agency agrees to apply its rules, regulations, directives[,] and orders in a fair and equitable manner."[1] Article 117 states that:

> Unless prohibited by law, the Agency shall certify as eligible to attend the [DOD schools] the dependent children of all [BUEs] attaining school age currently assigned to any facility outside of the [c]ontinental United States . . . where the Secretary of Defense has determined, under his/her authority under [10 U.S.C. §] 2164(a), that the appropriate educational programs are not available through the local educational [a]gency . . . . Upon registration documentation of enrollment being provided to the appropriate Agency official, the Agency shall promptly make payment to the institution for tuition.[2]

[1] Award at 4.
[2] Exceptions, Attach. at 294.

The grievance remained unresolved, and the parties submitted the matter to arbitration.

At arbitration, the parties did not stipulate to an issue, and the Arbitrator framed the issue as:

> Whether the Agency violated, and continues to violate Article 102 and Article 117 of the [parties' agreement] and/or applicable rule, regulations[,] and laws by implementing the eligibility requirements contained in [the policy] . . . regarding [the] refusal [of the Agency] to pay the tuition for dependent children in prekindergarten in Guam and Puerto Rico. If so, what is the appropriate remedy?[3]

At arbitration, the Union argued that, although the parties' agreement does not directly define the term "school age," the DOD school program defines and recognizes children in prekindergarten as "school age." The Agency argued, as pertinent here, that the Union did not bargain for the term "school age" to include children of the age to attend prekindergarten and that the adoption of such an interpretation would violate 49 U.S.C. §§ 106(*l*) and 40122(a), both concerning the Agency's bargaining obligations. The Agency also argued that the Arbitrator should take into account DOD regulations promulgated under power delegated through 10 U.S.C. § 2164 when interpreting the term "school age." Based on those regulations, the Agency continued, "the Arbitrator must conclude that the language of Article 117 referring to 'school age' cannot and should not be interpreted to include" prekindergarten.[4]

Citing DOD Directive 1324.20 concerning the mission of DOD schools, the Arbitrator determined that the goal of the DOD schools is "to afford an exemplary education by overseeing the operation of [DOD schools], by providing instruction from [prekindergarten] through grade [twelve] to eligible dependents."[5] The Arbitrator found that "[i]n negotiating the language of Article 117[,] the parties implicitly accede[d] to the DOD as the authority governing overseas education and its apparent reference to students attending . . . from pre[]kindergarten through grade [twelve]."[6] Therefore, the Arbitrator concluded, the term "school age" includes dependents in prekindergarten, and the Agency violated Articles 102 and 117 of the parties' agreement with its policy that excludes the payment of tuition for prekindergarten for dependents of eligible employees in Guam and Puerto Rico.

As a remedy, the Arbitrator ordered that the Agency "cease and desist from applying" the policy as written and change the language of the policy to state that "[t]hese provisions are applicable for eligible dependents in the elementary[-] and secondary[-]education programs (i.e.[,] pre[]kindergarten through grade twelve)."[7] The Arbitrator also ordered that the Agency make whole all BUEs adversely impacted by the implementation of the Agency's policy as well as pay fees and expenses for the Union.

The Agency filed exceptions to the award, and the Union filed an opposition.

III. Preliminary Matters

A. Section 2429.5 of the Authority's Regulations bars one of the Agency's contrary-to-law exceptions.

In its exceptions, the Agency argues that the award is contrary to law because "the Arbitrator's conclusion that 'school age' was not defined by the parties in the [parties' agreement] is contrary to 10 U.S.C. § 2164."[8] The Agency continues, arguing that "the Arbitrator failed to utilize the language of 10 U.S.C. § 2164 cited in Article 117, Section 1, of the [parties' agreement] in determining what Congress intended when it tied the definition of an appropriate education program to the free public education provided for children in specific local agencies."[9] However, before the Arbitrator, the Agency conceded that "Article 117 does not define 'school age'"[10] and that "the [p]arties did not define 'school age' in Article 117."[11] Therefore, the Agency's position before the Authority is inconsistent with the position it took before the Arbitrator.

The Authority applies § 2429.5 of the Authority's Regulations to bar a party from advancing a position before the Authority that is inconsistent with a position it took before the arbitrator.[12] Accordingly, we dismiss this exception as barred by § 2429.5 of the Authority's Regulations.

[3] Award at 2.
[4] Exceptions, Attach. at 47.
[5] Award at 14.
[6] *Id.*
[7] *Id.* at 17 (internal quotation marks omitted).
[8] Exceptions Br. at 4.
[9] *Id.* at 5.
[10] Exceptions, Attach. at 43.
[11] *Id.* at 46.
[12] *U.S. Dep't of the Air Force, 442nd Fighter Wing, Whiteman Air Force Base, Mo.*, 66 FLRA 357, 361 (2011); *U.S. Dep't of Transp., FAA, Detroit, Mich.*, 64 FLRA 325, 328 (2009); *U.S. Dep't of the Treasury, IRS*, 57 FLRA 444, 448 (2001).

B. Sections 2425.4(c) and 2429.5 of the Authority's Regulations do not bar the Agency's exception alleging that the Arbitrator exceeded his authority.

The Agency argues that the Arbitrator exceeded his authority by granting relief to employees outside of the bargaining unit.[13] The Union argues that, because the Agency did not object to the relief requested by the Union, the Agency cannot now argue that the Arbitrator exceeded his authority by granting that relief.[14] Although the Union argues that the Arbitrator granted its requested relief, the record does not indicate that the Union requested the specific language changes to the policy to which the Agency now files exceptions. There is no basis in the record for concluding that the Agency could have raised an objection to the Arbitrator's relief prior to the issuance of the award. Consequently, §§ 2425.4(c) and 2429.5 of the Authority's Regulations do not bar this exception.[15]

C. The exceptions are not deficient on the ground that the Agency allegedly failed to challenge the violation of Article 102.

The Union argues that the Agency's exceptions should be denied because the Arbitrator based his decision on finding violations of Articles 102 and 117, yet the Agency does not argue that the Arbitrator's ruling on Article 102 is deficient.[16] The Authority has consistently required that when an arbitrator has based an award on separate and independent grounds, an excepting party must establish that all of the grounds are deficient before the Authority will find that the award is deficient.[17] However, although the Arbitrator found that the Agency's policy violated both articles, he analyzed and discussed only the terms of Article 117, and did not separately analyze or discuss the terms of Article 102. As a result, the award does not indicate that each article provided a separate and independent ground for the award, and we do not deny the exceptions on the ground that the Agency allegedly failed to challenge the finding of a violation of Article 102.[18]

IV. Analysis and Conclusions

A. The award is not contrary to 49 U.S.C. §§ 106(*l*) or 40122(a).

The Agency argues that the award is contrary to law as contrary to 49 U.S.C. §§ 106(*l*) and 40122(a).[19] As part of the Agency's organic statute, 49 U.S.C. § 106(*l*) states that, in fixing compensation and benefits, the Agency's administrator "shall not engage in any type of bargaining, except to the extent provided for in [49 U.S.C.] § 40122(a), nor shall the [a]dministrator be bound by any requirement to establish such compensation or benefits at particular levels."[20] In turn, 49 U.S.C. § 40122(a)(1) states that the Agency's "[a]dministrator shall negotiate with the exclusive representatives of employees of the [Agency] certified under [§ 7111 of the Federal Service Labor-Management Relations Statute (the Statute)[21]]."[22] Read together, these statutes indicate that the Agency's administrator shall not bargain concerning compensation and benefits except with exclusive representatives certified under the Statute.

The Agency argues that the award is contrary to 49 U.S.C. §§ 106(*l*) and 40122(a) because "it would force the [a]dministrator [of the Agency to] agree to a matter of 'compensation and benefits' without consent or via negotiations under" 49 U.S.C. § 40122.[23] However, this argument overlooks the fact that the parties did negotiate both the term "school age" and for the Arbitrator's interpretation of that term. It is fundamental to the Statute that "[a]ny agency and any exclusive representative . . . shall meet and negotiate in good faith for the purposes of arriving at a collective[-]bargaining agreement."[24] Any agreement negotiated under the Statute "shall provide procedures for the settlement of grievances."[25] Additionally, any negotiated agreement must "provide that any grievance not satisfactorily settled under the negotiated grievance procedure shall be subject

[13] Exceptions Br. at 23-26.
[14] Opp'n at 22.
[15] *AFGE, Local 3911, AFL-CIO*, 68 FLRA 564, 566 (2015); *U.S. DOL*, 60 FLRA 737, 738 (2005); *USDA, Animal & Plant Health Inspection Serv., Plant Prot. & Quarantine*, 57 FLRA 4, 5 (2001).
[16] Opp'n at 10.
[17] *U.S. DOJ, Fed. BOP, Metro. Det. Ctr., Guaynabo, San Juan, P.R.*, 66 FLRA 81, 86-87 (2011) (*DOJ*); *U.S. Dep't of Energy, Office of Scientific & Technical Info., Oak Ridge, Tenn.*, 63 FLRA 219, 220 (2009).
[18] *Fed. BOP v. FLRA*, 654 F.3d 91, 97 (D.C. Cir. 2011) ("[B]ecause the arbitral award makes no distinction between the purportedly 'separate' statutory and contractual grounds for the award, the [agency] correctly maintains it was not required to file a separate exception."); *DOJ*, 66 FLRA at 86-87.
[19] Exceptions Br. at 13.
[20] 49 U.S.C. § 106(*l*)(1).
[21] 5 U.S.C. §§ 7101-7135.
[22] 49 U.S.C. § 40122(a)(1).
[23] Exceptions Br. at 15.
[24] 5 U.S.C. § 7114(a)(4).
[25] *Id.* § 7121(a)(1).

to binding arbitration."[26] The question of the interpretation of the agreement is a question solely for the arbitrator because it is the arbitrator's construction of the agreement for which the parties have bargained.[27] As interpreted by the Arbitrator, the term "school age" in Article 117 includes payments for prekindergarten, a result bargained for by the parties.

The Agency requests that we apply *Chevron* deference to its interpretation of 49 U.S.C. §§ 106 and 40122.[28] Under *Chevron*, if Congress has not spoken directly to the question at issue, an agency's interpretation of a statute that it is charged with administering is entitled to deference by a reviewing body if that interpretation is "based on a permissible construction of the statute."[29] As the Supreme Court noted, "the principle of deference to administrative interpretations has been consistently followed . . . whenever decision as to the meaning or reach of a statute has involved reconciling conflicting policies, and a full understanding of the force of the statutory policy in the given situation has depended upon more than ordinary knowledge respecting the matters subjected to agency regulations."[30]

However, even if we were to apply *Chevron* deference, the Agency does not present an interpretation of 49 U.S.C. §§ 106(*l*) or 40122(a) that differs from that applied above. Instead, the Agency argues that Article 117 does not include prekindergarten, and, therefore, the parties did not bargain for the payment of prekindergarten. This argument presents an interpretation of Article 117 of the parties' agreement, not an interpretation of the Agency's governing statute. While an agency's interpretation of its governing statute may receive deference under *Chevron*, it is an arbitrator's interpretation of the parties' agreement that receives deference from the Authority because it is this interpretation for which the parties bargained.[31]

As the parties negotiated for both the language of Article 117 and the Arbitrator's interpretation of that language, the award does not violate 49 U.S.C. §§ 106(*l*) or 40122(a). Consequently, the Agency has failed to demonstrate that the award is contrary to 49 U.S.C. §§ 106(*l*) or 40122(a), and we deny this contrary-to-law exception.

B. The award is not contrary to any DOD- or government-wide regulation.

The Agency also argues that the award is contrary to DOD regulations implementing 10 U.S.C. § 2164.[32] However, as the Agency admits, "any alleged inconsistency between the award and th[e]se [DOD] regulations does not provide a basis for finding the award deficient."[33] Because the Agency concedes that the parties' agreement governs over DOD regulations, we deny this exception.

Additionally, the Agency alleges that the award is contrary to a government-wide regulation.[34] However, the Agency does not cite to any government-wide regulation. As such, the Agency has failed to support this exception, and we deny it.[35]

C. The award does not fail to draw its essence from the parties' agreement.

The Agency argues that the award fails to draw its essence from the parties' agreement because "the Arbitrator's [a]ward in this matter cannot be in any rational [way] derived from Article 102 or Article 117" of the parties' agreement.[36] In reviewing an arbitrator's interpretation of a collective-bargaining agreement, the Authority applies the deferential standard of review that federal courts use in reviewing arbitration awards in the private sector.[37] Under this standard, the Authority will find that an arbitration award is deficient as failing to draw its essence from the collective-bargaining agreement when the appealing party establishes that the award: (1) cannot in any rational way be derived from the agreement; (2) is so unfounded in reason and fact and so unconnected with the wording and purposes of the collective-bargaining agreement as to manifest an infidelity to the obligation of the arbitrator; (3) does not represent a plausible interpretation of the agreement; or

[26] *Id.* § 7121(b)(1)(C)(iii).
[27] *United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29, 37-38 (1987) (*Paperworkers*); *U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Forrest City, Ark.*, 68 FLRA 672, 674 (2015) (*BOP*); *U.S. DOL (OSHA)*, 34 FLRA 573, 575 (1990) (*OSHA*).
[28] Exceptions Br. at 13.
[29] *U.S. Dep't of VA, Veterans Health Admin.*, 64 FLRA 961, 964 (2010) (quoting *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984) (*Chevron*)) (internal quotation marks omitted); *see generally AFGE, Local 1547*, 67 FLRA 523, 525-26 (2014), *recons. denied*, 68 FLRA 557 (2015) (discussing levels of deference).
[30] *Chevron*, 467 U.S. at 844 (internal quotation mark omitted).
[31] *Paperworkers*, 484 U.S. at 37-38; *BOP*, 68 FLRA at 674; *OSHA*, 34 FLRA at 575.
[32] Exceptions Br. at 8.
[33] *Id.* at 17 (citing *AFGE, Local 1658*, 61 FLRA 80, 82 (2005)).
[34] Exceptions Form at 4.
[35] 5 C.F.R. § 2425.6(e) ("An exception may be subject to . . . denial if . . . [t]he excepting party fails to . . . support a ground.").
[36] Exceptions Br. at 18.
[37] 5 U.S.C. § 7122(a)(2); *AFGE, Council 220*, 54 FLRA 156, 159 (1998).

(4) evidences a manifest disregard of the agreement.[38] The Authority and the courts defer to arbitrators in this context because it is the arbitrator's construction of the agreement for which the parties have bargained.[39]

The Agency notes that the parties agreed that the DOD is the controlling authority "with regard to the interpretation and application of the eligibility standards for dependents" of BUEs.[40] The Agency argues that the Arbitrator should have applied DOD Instruction 1342.26 and DOD Directive 1342.21 to determine that "school age" did not include dependents of prekindergarten age. Although supporting the Agency's own interpretation of the parties' agreement, this argument does not demonstrate how the Arbitrator's interpretation of the parties' agreement – relying on DOD Directive 1324.20 – is irrational, unfounded, implausible, or in manifest disregard of the agreement.[41] Therefore, we deny this exception.

D. The Arbitrator exceeded his authority.

The Agency alleges that the Arbitrator exceeded his authority because the remedy extends not only to BUEs, but alters the language of an Agency policy that applies to both BUEs and non-BUEs.[42] As relevant here, an arbitrator exceeds his or her authority in connection with a remedy where the arbitrator awards relief to persons who did not file a grievance on their own behalf and did not have the union file a grievance for them.[43] Applying this standard, the Authority has consistently held that if a grievance is limited to a particular grievant, then the remedy must be similarly limited.[44] The Union concedes that its grievance only sought a remedy for BUEs, but it argues that the granted remedy does not apply to employees outside of the bargaining unit.[45] However, despite the Union's requested relief, the plain language of the award requires that the Agency change the language of the policy, a policy that applies to both those within and without the bargaining unit.[46] In issuing an award that affects non-BUEs, the Arbitrator exceeded his authority.[47] Consequently, we modify the award to exclude from the award all relief to non-BUEs.[48]

V. Decision

We dismiss, in part, deny, in part, and grant, in part, the Agency's exceptions, and we modify the award to exclude all relief to non-BUEs.

[38] *BOP*, 68 FLRA at 674; *OSHA*, 34 FLRA at 575.
[39] *Paperworkers*, 484 U.S. at 37-38; *BOP*, 68 FLRA at 674; *OSHA*, 34 FLRA at 575.
[40] Award at 8.
[41] *U.S. Dep't of the Treasury, IRS*, 63 FLRA 616, 618 (2009); *U.S. Dep't of the Air Force, Griffiss Air Force Base, Rome, N.Y.*, 39 FLRA 889, 895 (1991).
[42] Exceptions Br. at 26.
[43] *U.S. Dep't of Energy, Oak Ridge Office, Oak Ridge, Tenn.*, 64 FLRA 535, 538 (2010); *U.S. Dep't of the Air Force, Okla. City Air Logistics Ctr., Tinker Air Force Base, Okla.*, 42 FLRA 680, 685 (1991) (*Air Force*).
[44] *Air Force*, 42 FLRA at 686; *U.S. Dep't of the Air Force, Okla. City Air Logistics Ctr., Tinker Air Force Base, Okla.*, 45 FLRA 1234, 1240-1241 (1992).
[45] Opp'n at 22-23.
[46] Exceptions, Attach. at 414 ("This policy applies to: (1) [n]on-bargaining[-]unit employees/positions [and] (2) bargaining[-]unit employees/positions, except where the applicable collective[-]bargaining agreement contains conflicting provisions or the subject has not been negotiated.").
[47] *U.S. Dep't of the Air Force, Luke Air Force Base, Phx., Ariz.*, 62 FLRA 214, 215-16 (2007); *Air Force*, 42 FLRA at 685.
[48] *U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Tucson, Ariz.*, 66 FLRA 355, 356 (2011).